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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 2005-91; FAR Case 2014-018; Item IX; Docket No. 2014-0018, Sequence No. 1]

RIN 9000-AN07

Federal Acquisition Regulation: Contractors Performing Private Security Functions

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to remove the DoD-unique requirements for contractors performing private security functions outside the United States and provide a definition of "full cooperation" within the associated clause.

DATES: Effective: **[Insert date 30 days after date of publication in the FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-91, FAR Case 2014-018.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 80 FR 30202 on May 27, 2015, to implement section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110-181) (as amended by other NDAA's, see 10 U.S.C. 2302 Note). This rule amends FAR 25.302, Contractors performing private security functions outside the United States, and the associated clause at 52.225-26 to remove the DoD-unique requirements, which were incorporated in the Defense Federal Acquisition Regulation Supplement (DFARS) on June 30, 2016 (81 FR 42559). This rule also adds the definition of "full cooperation" to FAR clause 52.225-26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause.

One respondent submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comment in the development of the final rule.

A. Summary of significant changes.

There were no changes made to the rule as a result of the one comment received. There were no comments on the Regulatory Flexibility Analysis.

B. Analysis of public comments:

A discussion of the comment follows:

Employing quasi-military armed forces:

Comment: The respondent did not comment on any of the proposed changes in the proposed rule. The respondent commented on the alleged employment of mercenaries by contractors performing private security functions overseas and further stated that this is prohibited as codified at 5 U.S.C. 3181. The respondent recommended a change to the FAR to make it clear that the U.S. Government will not employ mercenaries.

Response: The respondent's comments are not within the scope of this rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and

of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The objective of this rule is to amend FAR 25.302, Contractors performing private security functions outside the United States, and the associated clause at 52.225-26 to remove the DoD-unique requirements, which will be incorporated in the Defense Federal Acquisition Regulation Supplement (DFARS). The rule also adds a definition of "full cooperation" to FAR clause 52.225-26 in order to affirm that the contract clause does not foreclose any contractor rights arising in law, the FAR, or the terms of the contract when cooperating with any Government-authorized investigation into incidents reported pursuant to the clause.

No comments were received from the public relative to the initial regulatory flexibility analysis.

DoD, GSA, and NASA do not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. Based on data available in the Federal Procurement Data System (FPDS), DoD awarded 403 contracts in FY 2013 in support of a designated contingency operation outside of the United States, of which 63 contracts (15.6 percent) were awarded to small businesses. Therefore, it is estimated that this rule will apply to approximately 63 small businesses.

This rule does not create any new reporting, recordkeeping, or other compliance requirements.

There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant because it is removing DoD-unique requirements from the FAR, to be incorporated in the DFARS.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

This rule does not affect the information collection requirements in FAR clause 52.225-26, currently approved under OMB Control Number 9000-0184, titled: Contractors Performing Private Security Functions Outside the United States, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). The estimated total annual public hour and cost burden in OMB control number 9000-0184 was calculated based on data for the contracts and subcontracts of non-DoD agencies, because DoD's information collection was previously approved under OMB control number 0704-0460. Therefore, removing the DoD-unique requirements from the FAR does not impact the approved estimates for OMB clearance 9000-0184.

List of Subject in 48 CFR Parts 25 and 52

Government procurement.

Dated: September 19, 2016.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 25 and 52 as set forth below:

1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 25—FOREIGN ACQUISITION

25.302-2 [Amended]

2. Amend section 25.302-2 by removing from the definition "Other significant military operations" the phrase "(see 25.302-3(b)(2))." and adding "(see 25.302-3(a)(2))." in its place.

3. Amend section 25.302-3 by—

- a. Revising paragraph (a);
- b. Removing paragraph (b); and
- c. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d), respectively.

The revision reads as follows:

25.302-3 Applicability.

(a) This section applies to contracts that require performance outside the United States—

(1) In an area of combat operations as designated by the Secretary of Defense; or

(2) In an area of other significant military operations as designated by the Secretary of Defense, and

only upon agreement of the Secretary of Defense and the Secretary of State.

* * * * *

25.302-4 [Amended]

4. Amend section 25.302-4 by-

a. Removing from paragraph (a)(1) "(PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations" and adding "Operating in Contingency Operations" in its place; and

b. Removing from paragraph (a)(2) "to cooperate" and adding "to fully cooperate" in its place.

5. Amend section 25.302-6 by revising paragraph (a) to read as follows:

25.302-6 Contract clause.

(a) Use the clause at 52.225-26, Contractors Performing Private Security Functions Outside the United States, in solicitations and contracts for performance outside the United States in an area of-

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.212-5 by—

a. Revising the date of the clause, paragraphs

(b) (51) and (e) (1) (xviii); and

b. Amending Alternate II by—

1. Revising the date of Alternate II;

2. Redesignating paragraphs (e) (1) (ii) (O) through (R) as paragraphs (e) (1) (ii) (P) through (S), respectively; and

3. Adding a new paragraph (e) (1) (ii) (T).

The revisions read as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(b) * * *

____(51) 52.225-26, Contractors Performing Private Security Functions Outside the United States ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

* * * * *

(e) (1) * * *

(xviii) 52.225-26, Contractors Performing Private Security Functions Outside the United States ([INSERT

**ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION
IN THE FEDERAL REGISTER]**) (Section 862, as amended, of the
National Defense Authorization Act for Fiscal Year 2008; 10
U.S.C. 2302 Note).

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Alternate II (**[INSERT ABBREVIATED MONTH AND YEAR 30 DAYS
AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**). * * *

* * * * *

(e) (1) * * *

(ii) * * *

(T) 52.225-26, Contractors Performing Private
Security Functions Outside the United States (**[INSERT
ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION
IN THE FEDERAL REGISTER]**) (Section 862, as amended, of the
National Defense Authorization Act for Fiscal Year 2008; 10
U.S.C. 2302 Note).

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7. Amend section 52.213-4 by revising the date of the
clause and paragraph (a) (2) (viii) to read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions
(Other Than Commercial Items).**

* * * * *

**TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL
ITEMS) ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER
DATE OF PUBLICATION IN THE FEDERAL REGISTER])**

* * * * *

(a) * * *

(2) * * *

(viii) 52.244-6, SUBCONTRACTS FOR COMMERCIAL ITEMS
(**[INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF
PUBLICATION IN THE FEDERAL REGISTER]**).

* * * * *

8. Amend section 52.225-26 by—

- a. Revising the introductory text and the date of the clause;
- b. Revising the introductory text of paragraph (a); and adding in alphabetical order, the definitions “Area of combat operations”, “Full cooperation”, and “Other significant military operations”;
- c. Revising paragraph (b);
- d. Removing from paragraph (c) (2) (i) “(PSCs) Operating in Contingency Operations, Combat Operations, or Other Significant Military Operations” and adding “Operating in Contingency Operations” in its place;
- e. Removing from paragraph (c) (3) “Cooperate” and adding “Provide full cooperation” in its place; and
- f. Revising paragraph (f).

The revisions read as follows:

52.225-26 Contractors Performing Private Security Functions Outside the United States.

As prescribed in 25.302-6, insert the following clause:

CONTRACTORS PERFORMING PRIVATE SECURITY FUNCTIONS OUTSIDE THE UNITED STATES ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

(a) Definitions. As used in this clause—

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of contractors performing private security functions working for Government agencies is required.

Full cooperation—

(1) Means disclosure to the Government of the information sufficient to identify the nature and extent of the incident and the individuals responsible for the conduct. It includes providing timely and complete responses to Government auditors' and investigators' requests for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require—

(i) The Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney-client privilege or Fifth Amendment rights; and

(3) Does not restrict the Contractor from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that is carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force.

* * * * *

(b) Applicability. If this contract is performed both in a designated area and in an area that is not designated, the clause only applies to performance in the following designated areas—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense, and only upon

agreement of the Secretary of Defense and the Secretary of State.

* * * * *

(f) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that will be performed outside the United States in areas of—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, upon agreement of the Secretaries of Defense and State that the clause applies in that area.

* * * * *

9. Amend section 52.244-6 by revising the date of the clause and paragraph (c) (1) (xv) to read as follows:

52.244-6 Subcontracts for Commercial Items.

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SUBCONTRACTS FOR COMMERCIAL ITEMS ([**INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**])

* * * * *

(c) * * *

(1) * * *

(xv) 52.225-26, Contractors Performing Private Security Functions Outside the United States ([**INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]) (Section 862, as amended, of the National Defense Authorization Act for Fiscal Year 2008; 10 U.S.C. 2302 Note).

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